No. 18-525

IN THE
Supreme Court of the United States

FORT BEND COUNTY,
Petitioner,

v.

LOIS M. DAVIS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

This case sits at the intersection of two lines of this Court's precedent. In a series of cases dating back over a century, the Court has held that "when Congress creates procedures designed to permit agency expertise to be brought to bear on particular problems," it generally intends to "limit [the] jurisdiction" of the district courts. *Free Enter. Fund* v. *Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 489 (2010) (internal quotation marks omitted). This longstanding presumption is rooted in the common-sense proposition that Congress is unlikely to intend to leave open the courtroom doors for those who evade a statutorily mandated administrative process. And

the presumption is strong enough that it displaces district court jurisdiction even in some cases where the statute is "facially silent" as to whether the claims in question must be brought through the administrative scheme. *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 208 (1994).

In another set of cases, beginning with *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500 (2006), the Court, "mindful of the consequences of typing [a requirement] a determinant of subject-matter jurisdiction," has insisted on a clear statement before deeming a statutory requirement jurisdictional. *Id.* at 513-515.

The primary question in this case is which line of precedent controls the analysis of Title VII's exhaustion requirement, which all agree is part of a scheme of administrative and judicial review that mandates that plaintiffs present their claims to the Equal Employment Opportunity Commission in the first instance. Petitioner submits that the answer is dictated by our constitutional system of separated powers, which commits control over jurisdiction to Congress, not the courts. Where the Court must choose between a standard predicated on congressional intent, and a court-made rule based in prudential considerations, congressional intent trumps.

Indeed, this Court's clear-statement precedent recognizes as much. While respondent and the Government assert that a clear statement is *always* necessary, this Court has recognized at least two exceptions, designed to ensure that the rule applies only when it captures congressional intent: The Court has not demanded a clear statement where a requirement inherently implicates the scope of the judicial power or where "a long line of this Court's

decisions left undisturbed by Congress has treated a similar requirement as jurisdictional." *Henderson ex rel. Henderson* v. *Shinseki*, 562 U.S. 428, 436 (2011) (internal quotation marks omitted).

Both exceptions apply to statutory exhaustion requirements like the one in Title VII. Such provisions necessarily implicate the judiciary's adjudicatory power by assigning authority over claims to an agency in the first instance. That is why no party has been able to locate a single case in which this Court has held an analogous statutory exhaustion requirement non-jurisdictional, and why petitioner can point to a "long line" of this Court's precedent deeming such statutory mandates jurisdictional. *Id.*

Respondent and the Government attempt to distinguish that precedent, but their efforts fall flat. Contrary to respondent's argument, these cases do not merely concern *which* court should review a claim; in each one, the Court focused on whether the statutory scheme made it "fairly discernible" that Congress intended to "allocate[ ] initial review to an administrative body." *Thunder Basin*, 510 U.S. at 207. Nor does Title VII fall outside this line of cases, as the Government argues, because it empowers the EEOC to resolve claims through investigation and conciliation, rather than adjudication. That is a feature, not a bug: Congress sought to eliminate discriminatory employment practices through "[c]ooperation and voluntary compliance," *Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645, 1651 (2015), and so vested "exclusive jurisdiction" first in the hands of an expert agency that could pursue cooperative means for claim resolution and avoid the need to resort to courts. *EEOC* v. *Waffle House, Inc.*, 534

U.S. 279, 288 (2002). Courts have no basis to excuse compliance with that scheme because Congress chose to make the administrative process *less* adversarial.

In any event, even if respondent and the Government were correct that *Arbaugh*'s clear-statement rule applies to this case, Title VII's exhaustion requirement would still be jurisdictional. The text, structure, and relevant precedent all demonstrate that Congress clearly intended that result. And Congress's purposes in enacting Title VII may be vindicated only through a jurisdictional rule.

The judgment should be reversed.

ARGUMENT

I. TITLE VII'S EXHAUSTION REQUIREMENT IS JURISDICTIONAL.

A. *Arbaugh*'s Clear-Statement Rule Does Not Apply.

1. Petitioner's opening brief explained that this Court applies a "fairly discernible" standard to determine whether statutory exhaustion requirements mandating that a plaintiff present her claim first to an expert federal agency are jurisdictional. Pet. Br. 18-23. Respondent and the Government stake their case on the proposition that *Arbaugh*'s clear-statement rule should instead apply. By their account, *Arbaugh* dictates that a clear statement is always necessary to deem a statutory requirement jurisdictional, even in the case of an integrated scheme of administrative and judicial review. Resp. Br. 14-15; U.S. Br. 12-14.

Respondent and the Government misstate this Court's approach. In recent years, this Court has sometimes applied a clear-statement rule to deter-

mine whether certain kinds of statutory conditions are jurisdictional. *See* Erin Morrow Hawley, *The Supreme Court's Quiet Revolution: Redefining the Meaning of Jurisdiction*, 56 Wm. & Mary L. Rev. 2027 (2015). In many cases, that rule is "suited to capture Congress' likely intent." *Henderson*, 562 U.S. at 436; *see United States* v. *Kwai Fun Wong*, 135 S. Ct. 1625, 1631 (2015). But not always. In at least two circumstances, the Court has eschewed application of the clear-statement rule because it is unlikely to approximate congressional intent.

First, the Court has not required a clear statement if a provision necessarily "governs a court's adjudicatory capacity." *Henderson*, 562 U.S. at 435. Where provisions are inherently jurisdictional, this Court needs no further indication that Congress intended to "speak[] * * * to a court's power." *Wong*, 135 S. Ct. at 1632.

Second, even when a statutory provision does not obviously implicate the scope of judicial power, the Court "will presume" that the requirement is jurisdictional if "a long line of this Court's decisions left undisturbed by Congress has treated a similar requirement as jurisdictional." *Henderson*, 562 U.S. at 436; *see John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 135-136 (2008). As this Court put it in *Reed Elsevier, Inc.* v. *Muchnick*, 559 U.S. 154 (2010), the "historical treatment" of a particular "type of limitation" may dictate that it is "properly ranked as jurisdictional *absent an express designation*." *Id.* at 168 (emphasis added).

These exceptions make sense. If a rule naturally touches on the scope of the courts' power, Congress has no need to expressly label it jurisdictional. And

this Court "normally assume[s]" that Congress legislates against the backdrop of Supreme Court precedent, and so intends to incorporate the settled meaning of certain types of statutory provisions. *Ryan* v. *Gonzales*, 568 U.S. 57, 66 (2013) (internal quotation marks omitted).

The exceptions are also rooted in our constitutional system of separation of powers. "Within Constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider." *Bowles* v. *Russell*, 551 U.S. 205, 212 (2007). "To deny this position would be to elevate the judicial over the legislative branch of the government, and to give to the former powers limited by its own discretion merely." *Cary* v. *Curtis*, 44 U.S. (3 How.) 236, 245 (1845). Accordingly, *Arbaugh*'s clear-statement rule may only apply to the extent it accurately reflects Congress's intent. When it ceases to do so, this Court has no warrant to ignore Congress's likely intent based on a judicially crafted presumption.

2. Exhaustion provisions like the one in Title VII satisfy *both* exceptions to the clear-statement rule. They are therefore analyzed under the "fairly discernible" standard agreed upon by all nine Justices in *Elgin* v. *Department of Treasury*, 567 U.S. 1 (2012). *Id.* at 9 (majority opinion); *see id.* at 25 (Alito, J., dissenting) ("When Congress creates an administrative process to handle certain types of claims, it impliedly removes those claims from the ordinary jurisdiction of the federal courts.").

Statutory exhaustion requirements fit within the first exception because provisions allocating power over a particular claim between the Executive and the Judiciary inherently concern "the control of

Congress over the jurisdiction of courts of its own creation." *Hallowell* v. *Commons*, 239 U.S. 506, 509 (1916). Over a century ago, Justice Holmes found it obvious that a "district court had no jurisdiction" where a statute gave the Secretary of the Interior the exclusive "power" to decide the claim. *Id.* at 507-508. Statutory exhaustion requirements that vest initial authority in the hands of an administrative body similarly displace the jurisdiction of the courts while the agency is entrusted with power over a claim. *See Elgin*, 567 U.S. at 9-10.

They also fit within the second exception because a "long line of this Court's decisions left undisturbed by Congress *** treat[s] [these] requirement[s] as jurisdictional." *Henderson*, 562 U.S. at 436. According to a seminal 1939 article on administrative exhaustion, the principle that the courts' jurisdiction is temporarily displaced where Congress "confide[s] preliminary processes to administrative bodies" traces its origins at least as far back as 1907. Raoul Berger, *Exhaustion of Administrative Remedies*, 48 Yale L.J. 981, 993-995 (1939) (cited in *United States* v. *Jones*, 336 U.S. 641, 652 n.14 (1949); *Yakus* v. *United States*, 321 U.S. 414, 472 n.22 (1944)). In *Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), the Court held that a district court was without jurisdiction to pass on a particular issue because it had not yet been resolved by the relevant federal agency, even though the statute in question explicitly preserved common law actions like the one petitioner was pursuing. *Id.* at 438-439.

Since then, the Court has remained committed to the view that, when Congress empowers a federal

agency to consider a claim in the first instance, it generally intends to bar jurisdiction over claims that have not been presented to the agency. In *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938), for example, the Court described the "long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Id.* at 50-51. Likewise, in *United States* v. *Ruzicka*, 329 U.S. 287 (1946), the Court held that an administrative "procedure devised by Congress" implicitly foreclosed district court jurisdiction over a claim the agency had not considered. *Id.* at 292.

By 1965—one year after Title VII was enacted, and seven years before the 1972 amendments that created the current statutory scheme—this Court found it obvious that where Congress establishes "statutory review procedures designed to permit agency expertise to be brought to bear on particular problems, those procedures are to be exclusive." *Whitney Nat'l Bank in Jefferson Parish* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411, 420 (1965). And in case after case since then—including two post-dating *Arbaugh*—the Court has confirmed that "[p]rovisions for agency review" will "implicitly * * * restrict judicial review" so long as it is "fairly discernible" that Congress intended to "limit jurisdiction." *Free Enter. Fund*, 561 U.S. at 489.

3. Notwithstanding these precedents, respondent and the Government insist that statutory provisions requiring a plaintiff to exhaust her claim before an expert federal agency are subject to *Arbaugh*'s clear-statement rule. They rest that assertion almost entirely on a series of cases in which they claim this

Court applied the clear-statement rule to exhaustion requirements. But the cases they cite merely demonstrate that, like jurisdiction, exhaustion "is a word of many, too many meanings." *Steel Co.* v. *Citizens for Better Env't*, 523 U.S. 83, 90 (1998) (internal quotation marks omitted). Not one of their cited decisions concerns an exhaustion provision that requires a plaintiff to present an alleged violation of her statutory rights first to an expert federal agency and then to the courts.

Many of respondent's and the Government's supposed "exhaustion" cases instead involve statutes—like the Prison Litigation Reform Act and the Antiterrorism and Effective Death Penalty Act—that require a litigant to pursue available *state* remedies before going to federal court. *See* Resp. Br. 42-43 (citing *Jones* v. *Bock*, 549 U.S. 199, 211-212 (2007); *Woodford* v. *Ngo*, 548 U.S. 81, 101 (2006); *Strickland* v. *Washington*, 466 U.S. 668, 684 (1984)); U.S. Br. 24 (citing *Woodford* and *Jones*). But statutes requiring recourse to state processes implicate very different concerns than those involving federal agencies. Congress does not control the jurisdiction of state entities, and it is unlikely to intend to make federal-court jurisdiction turn on a litigant's ability to pursue state remedies if Congress cannot ensure that they will be available. *Cf. Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750 (1979).

The cases that respondent and the Government cite involving federal agencies are also inapposite. In *Reed Elsevier*, the provision in question required most (but not all) would-be plaintiffs to register their copyrights before bringing suit for copyright infringement. 559 U.S. at 157-158. That statute did

not require that a party present a claimed statutory violation to the agency, nor authorize the agency to attempt to resolve such claims.

In *Union Pacific Railroad Co.* v. *Brotherhood of Locomotive Engineers*, 558 U.S. 67 (2009), the provision at issue required employers and employees to informally confer before presenting their claims to the agency. *Id.* at 72-74, 86. This conferral requirement did not vest any authority in the agency (the conference was to be carried out by the parties without agency oversight); it could be overridden by a collective bargaining agreement; and the Court repeatedly noted that only *the agency*—which had no authority to decide the bounds of its own jurisdiction—had deemed the requirement jurisdictional. *Id.* at 72-74, 77-78, 82-85.

EPA v. *EME Homer City Generation, L.P.*, 572 U.S. 489 (2014), in turn, considered a statute requiring an entity to object to a proposed regulation during a notice-and-comment period before raising those issues in a petition for review of the final regulation. *Id.* at 511-512. But a requirement that a party inform an agency of the perceived problems with a potential regulation before its promulgation is different than a requirement that a party pursue an administrative channel for resolving a claim that her statutory rights have actually been violated. Further, the statutory requirement in *EME Homer* had multiple express exceptions, making plain that it was non-jurisdictional. 42 U.S.C. § 7607(d)(7)(B); *cf. Reed Elsevier*, 559 U.S. at 165.

In short, neither respondent nor the Government has identified even a single case in which this Court has applied the clear-statement rule to a statutory

provision requiring plaintiffs to invoke the claims resolution process of an expert federal agency in the first instance—let alone held such a requirement non-jurisdictional.

B. The Other Side Cannot Distinguish The Precedent Holding Analogous Statutory Exhaustion Requirements Jurisdictional.

Title VII's exhaustion requirement falls comfortably within the body of precedents deeming administrative review schemes jurisdictional. Pet. Br. 23-32. Respondent and the Government seek to distinguish these precedents, but their proposed distinctions fail.

1. Respondent argues that the cases on which petitioner relies are really about "*which court* has jurisdiction over a class of claims—not *which procedural requirements* are jurisdictional." Resp. Br. 38-39. That, however, is not what these decisions say. In *Thunder Basin*, the Court began its analysis by asking whether the statutory scheme made it "fairly discernible" that Congress intended to "allocate[] initial review to an *administrative body*." 510 U.S. at 207 (emphasis added). In *Free Enterprise Fund*, the Court phrased the inquiry as whether the relevant "[p]rovisions for *agency* review" reflected an "intent to limit jurisdiction" over the claims in question. 561 U.S. at 489 (emphasis added). And in *Elgin*, the Court stated the question as whether "a statutory scheme of *administrative* and judicial review" precluded plaintiffs "from pursuing their claims in federal district court." 567 U.S. at 8 (emphasis added).

It is also not what these decisions mean. In each case, the Court's analysis turned primarily on whether Congress intended an expert administrative

agency or a generalist court to exercise authority over the relevant claims in the first instance. *See, e.g.*, *Thunder Basin*, 510 U.S. at 215 ("we conclude that exclusive review * * * is appropriate since 'agency expertise [could] be brought to bear on' the statutory questions presented here" (quoting *Whitney*, 379 U.S. at 240)); *Elgin*, 567 U.S. at 23 (quoting same); *Free Enter. Fund*, 561 U.S. at 489 (same). That focus would make little sense if the Court's primary concern was which court had jurisdiction.

Further, respondent fails to point to any language in these decisions that would limit their application to statutory schemes that culminate in judicial review in the circuit courts. To the contrary, in *Free Enterprise Fund*, the Court viewed *Ruzicka* as part of this line of precedent, 561 U.S. at 491, even though "ultimate review" of the claims in that case was in the *district* courts, 329 U.S. at 292.

2. The Government, for its part, asserts that *Thunder Basin* and its progeny are distinguishable because they involve schemes for "administrative *adjudication*," U.S. Br. 27 (emphasis added), whereas Title VII enacts a scheme in which the agency is "empowered" to resolve claims "by informal methods of conference, conciliation, and persuasion," 42 U.S.C. § 2000e-5(a), (b). But, if anything, the non-adversarial nature of Title VII's administrative procedures provides an additional reason why the exhaustion requirement *should* be deemed jurisdictional. Congress selected "[c]ooperation and voluntary compliance as its preferred means" for resolving claims of employment discrimination. *Mach Mining*, 135 S. Ct. at 1651. Congress determined that goal could be achieved only if every claim was first pre-

sented to the administrative body charged with finding a cooperative means to resolve the alleged statutory violation, thereby decreasing the burden on courts, and increasing the chances that the employer-employee relationship will not be irredeemably damaged. *See* Pet. Br. 28. Allowing plaintiffs to skip the administrative process and go directly to litigation *because* EEOC proceedings are non-adversarial would turn Congress's scheme on its head.

Moreover, nothing in the *Thunder Basin* line of cases suggests that their reach is limited to statutes involving administrative adjudication. In each case, the Court has referred to the statutes as providing for administrative *"review."* *Elgin*, 567 U.S. at 5 (emphasis added); *Free Enter. Fund*, 561 U.S. at 489; *Thunder Basin*, 510 U.S. at 206. That term describes the EEOC's intricate and comprehensive process of investigation and conciliation. *See* Pet. Br. 23-27.

Elgin also refutes the Government's suggestion (at 26) that jurisdictional exhaustion only makes sense where the administrative process will produce a decision for the court to review. The *Elgin* Court acknowledged that the agency might not have the "authority" to issue a merits decision on petitioners' constitutional claims, but the Court nonetheless recognized a "jurisdictional rule" requiring the claims to be presented to the agency in the first instance. 567 U.S. at 15, 17-18.

3. Respondent's and the Government's theories also fail because they cannot account for many of this Court's cases holding statutory exhaustion requirements jurisdictional.

In *McNeil* v. *United States*, 508 U.S. 106 (1993), for example, the Court affirmed the jurisdictional dismissal of a claim because the petitioner failed to adhere to a statutory provision in the Federal Tort Claims Act (FTCA) requiring him to "exhaust[ ] [his] administrative remedies" before bringing suit. *Id.* at 113. The Court reached this result even though, like Title VII, the FTCA merely requires a party to present her claims to a federal agency to give it a chance to "consider[ ]" the claims and arrange a "settlement" before suit may be brought in *district* court. *Id.* at 112 n.7 (quoting S. Rep. No. 89-1327, at 3 (1966)). In the wake of *McNeil*, nearly every circuit has viewed the FTCA's exhaustion requirement as jurisdictional. *See, e.g.*, *Smith* v. *Clinton*, 886 F.3d 122, 127 (D.C. Cir.) (per curiam) (holding that, under the FTCA, district court lacked jurisdiction because plaintiffs "failed to exhaust their administrative remedies"), *cert. denied*, 139 S. Ct. 459 (2018); *see also Mader* v. *United States*, 654 F.3d 794, 805 & n.10 (8th Cir. 2011) (en banc) (collecting cases).

Although the Government now ignores *McNeil*, it too has interpreted the case that way. As recently as 2014, it argued that *McNeil* settled that the FTCA's exhaustion requirement is jurisdictional. *See, e.g.*, Brief for Petitioner at 50, *United States* v. *June*, No. 13-1075 (U.S. Sept. 9, 2014). Respondent suggests that *McNeil* did not really issue a jurisdictional holding because the Government's brief in *McNeil* suggested that the Court did not need to decide the issue. Resp. Br. 45. The Court, however, did not accept that suggestion: It affirmed the lower court's jurisdictional holding without suggesting that the dismissal should have been on the merits. 508 U.S. at 113. And it went out of its way to note that failure

to comply with the FTCA's exhaustion requirement should not be "excuse[d]," a hallmark of a jurisdictional requirement. *Id.*

Respondent and the Government similarly flounder in their efforts to distinguish the Court's repeated holdings that the Social Security Act (SSA) prevents a *district* court from assuming jurisdiction over a disability benefits claim until it has been presented to the agency. *See* Pet. Br. 21-22. They contend that this precedent is irrelevant because the SSA contains another provision "explicit[ly] withdraw[ing]" the statutory grants of district court jurisdiction in Sections 1331 and 1346. Resp. Br. 18; *see* U.S. Br. 25. But this Court implicitly rejected that distinction in *Thunder Basin*, in which it repeatedly relied on the SSA precedents even while acknowledging that the Mine Act was "facially silent" as to whether it limited jurisdiction over the claims at issue. 510 U.S. at 208.

Finally, respondent and the Government spend almost no time discussing the statutory exhaustion scheme on which Title VII was based: the National Labor Relations Act (NLRA). *See* Pet. Br. 35-36. The Government does not even mention the NLRA. Respondent hardly does better: It dismisses the *five* NLRA cases petitioner cited as reflecting "'less than meticulous' use of the term 'jurisdictional.'" Resp. Br. 44. But most of these cases involved an express holding with respect to the power of the courts to address NLRA claims in the first instance. Pet. Br. 20-22. For example, in *Marquez* v. *Screen Actors Guild, Inc.*, 525 U.S. 33 (1998), the Court considered at length which forms of statutory claims fall within the "primary jurisdiction" of the agency and there-

fore deprive the district courts of power to "exercise jurisdiction" over them. *Id.* at 49-50 (1998); *see id.* at 50 (citing additional cases recognizing that courts typically lack the power to "resolve statutory issues under the NLRA in the first instance"). This Court will generally pause before adopting a position that requires it to ignore or overrule a whole body of its precedent, and it should not vary from that practice here.

4. The Government offers one final suggestion: It posits that even if Title VII's exhaustion requirement is jurisdictional, that requirement is satisfied so long as a plaintiff has filed *some* charge with the EEOC, even if that charge does not contain the claim on which she seeks judicial relief. U.S. Br. 28. But an exhaustion requirement would be pointless if it did not attach to specific claims. The Government clearly recognizes as much because, three pages later, it states that if an employer properly raises an exhaustion defense, it is entitled to "seek dismissal" of any particular "claims" omitted from the charge. *Id.* at 31.

The Government does not explain what in the statute would permit the Court to infer that Congress intended the exhaustion requirement to function in this way—mandating claim-specific exhaustion, but permitting some lesser form of exhaustion for jurisdictional purposes. The Government relies on *Sims* v. *Apfel*, 530 U.S. 103 (2000), an SSA case holding that a court will not lightly apply a prudential "issue exhaustion" requirement. But the Government seems to have confused the words "issue" and "claim." In *Sims*, it was undisputed that the plaintiff had presented her only disability benefits *claim* to

both the administrative law judge and the Appeals Council. 530 U.S. at 106-107. The *Sims* Court was considering the assertion that it should impose an extra-statutory requirement that a plaintiff must inform the Appeals Council of every perceived defect in an ALJ's decision before presenting those "issues" to the reviewing court. *Id.* Here, in contrast, the District Court correctly found that respondent had not presented her *claim* of religious discrimination to the agency at all. Pet. Br. 54-56.

II. EVEN UNDER THE CLEAR-STATEMENT RULE, TITLE VII'S EXHAUSTION REQUIREMENT IS JURISDICTIONAL.

While statutory exhaustion requirements like the one in Title VII are properly assessed under the "fairly discernible" standard, petitioner would also prevail under the clear-statement rule.

Respondent and the Government contend that Title VII lacks a clear statement because it "neither uses the word 'jurisdiction' nor otherwise refers to the courts' authority." Resp. Br. 17; *see* U.S. Br. 15-16. But Congress need not "incant magic words" to make a requirement jurisdictional; it simply must make clear that it intends the requirement to "cabin a court's power." *Wong*, 135 S. Ct. at 1632. And from start to finish, Section 2000e-5 frames the requirement to file a charge with the EEOC in jurisdictional terms. It opens by "empower[ing]" the Commission to resolve claims of discrimination—language that this Court has held "grant[s] the EEOC exclusive jurisdiction over the claim for 180 days after the employee files a charge." *Waffle House*, 534 U.S. at 288. It then vests courts with "jurisdiction" only over "actions brought under this subchapter"—that is,

actions "brought against the respondent *named in the charge*" after "a charge *filed with the Commission*" has been dismissed or 180 days have passed. 42 U.S.C. § 2000e-5(f)(1), (3) (emphases added).

The structure of Title VII reinforces the jurisdictional character of its exhaustion requirement. The requirement is located within the statute's jurisdictional grant: Section 2000e-5(f). *See Henderson*, 562 U.S. at 439. Respondent contends that the statute's jurisdictional provision consists solely of Section 2000e-5(f)(3). Resp. Br. 19. But *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385 (1982), said otherwise: It described "[t]he provision granting district courts jurisdiction under Title VII" as "42 U.S.C. §§ 2000e-5(e) *and* (f)," at a time when Section 2000e-5(e) consisted solely of what is now subsection (f)(1)—that is, the exhaustion requirement. 455 U.S. at 393 (emphasis added); *see* 42 U.S.C. § 2000e-5(e) (1970). Congress later reaffirmed that understanding by moving the exhaustion requirement into subsection (f), which Congress itself had captioned "Courts; Jurisdiction." Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(f), 78 Stat. 241, 260.

Further, the exhaustion requirement contains "no exceptions." *Patchak* v. *Zinke*, 138 S. Ct. 897, 905 (2018). Respondent claims this Court has crafted an exception to the exhaustion requirement for "unnamed [class] members." Resp. Br. 22. Not so. The Court held, based primarily on legislative history, that where a class representative exhausts a claim that an employer engaged in a pattern or practice of discrimination, courts may grant *relief* on that claim for the entire class. *See Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 414 n.8 (1975). It did not hold

that courts have jurisdiction to consider an unexhausted claim, in the class action context or elsewhere.

Finally, this Court has held on at least *five* separate occasions that Title VII's exhaustion requirement is jurisdictional. *See McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 798 (1973); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47 (1974); *Gen. Tel. Co. of Nw., Inc.* v. *EEOC*, 446 U.S. 318, 326 (1980); *Waffle House*, 534 U.S. at 288; *EEOC* v. *Shell Oil Co.*, 466 U.S. 54, 65 (1984). Respondent entirely ignores two of these precedents, both of which stated that the filing of a charge gives the EEOC a period of "exclusive jurisdiction" over Title VII claims. *Waffle House*, 534 U.S. at 288; *see Gen. Tel. Co.*, 446 U.S. at 326. Respondent dismisses the other three decisions as "'drive-by' jurisdictional characterizations." Resp. Br. 26 & n.5. But the term "drive-by" is not a get-out-of-jail-free card for any jurisdictional precedent a litigant cannot distinguish. It refers to cases in which this Court "dismiss[ed] 'for lack of jurisdiction' * * * without explicitly considering whether the dismissal should be for lack of subject matter jurisdiction." *Arbaugh*, 546 U.S. at 511 (internal quotation marks omitted).

These cases do not fit that description. In *McDonnell Douglas* and *Alexander*, the Court characterized Title VII's claim-filing requirement as a "jurisdictional prerequisite[]" specifically to contrast it with statutory requirements that *do not* "divest[] federal courts of jurisdiction." *Alexander*, 415 U.S. at 47; *see McDonnell Douglas*, 411 U.S. at 798. And in *Shell Oil*, the Court "*h[e]ld* that the existence of a charge that meets the requirements set forth in § 706(b),

42 U.S.C. § 2000e-5(b), is a jurisdictional prerequisite to judicial enforcement of a subpoena issued by the EEOC." 466 U.S. at 65 (emphasis added).

Respondent's other cases (at 24-25) are even less relevant. No one disputes that the conciliation requirement at issue in *Mach Mining* is non-jurisdictional: Title VII expressly permits suit even where the EEOC takes no action, and authorizes courts to stay actions to give the EEOC an opportunity to "obtain voluntary compliance." 42 U.S.C. § 2000e-5(f)(1); *see Mach Mining*, 135 S. Ct. at 1656. The statute's exhaustion provision is subject to no such exceptions. Meanwhile, in *Oscar Mayer* the Court held that a court could retain jurisdiction over an Age Discrimination in Employment Act (ADEA) action precisely because the plaintiff had "satisfied the requirements of 29 U.S.C. § 626(e)"—the ADEA's analogue to Title VII's charge-filing requirement. 441 U.S. at 765 n.13. If anything, that holding supports the view that the filing of such a charge is a jurisdictional prerequisite to suit.

III. TITLE VII'S PURPOSES ARE BEST SERVED BY A JURISDICTIONAL EXHAUSTION REQUIREMENT.

Congress's purposes in enacting Title VII support the conclusion that the exhaustion requirement is jurisdictional. Congress required exhaustion to promote the non-adversarial resolution of Title VII claims outside of court; to advance the EEOC's primary role in identifying and combatting employment discrimination; and to vindicate principles of federalism and sovereign immunity. Pet. Br. 27-32, 45-47. These "system-related goal[s]" are the hallmarks of a jurisdictional rule, *John R. Sand*, 552

U.S. at 133, and they would be thwarted if plaintiffs could proceed to court without first presenting a claim to the EEOC.

Respondent and the Government make hardly any attempt to dispute these statutory purposes.[1] Their first defense is simply to dismiss those purposes as irrelevant. But their sole support for that proposition is a footnote in *Reed Elsevier* stating that a statute should not be deemed jurisdictional "*merely* because it promotes important congressional objectives." Resp. Br. 28 (emphasis added) (quoting *Reed Elsevier*, 559 U.S. at 169 n.9); U.S. Br. 29 (same). The Court did not reject *any* consideration of congressional purposes, which is important to an accurate assessment of congressional intent. *See, e.g.*, *Gonzalez* v. *Thaler*, 565 U.S. 134, 144-145 (2012). (examining statutory purpose to determine whether requirement is jurisdictional).

Respondent also speculates that Congress's purposes would be "equally well-served by a mandatory claim-processing rule" because defendants have

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[1] Respondent (at 30 & n.7) and the Government (at 21-23) assert that Section 2000e-5(f)(1) does not properly implicate sovereign immunity because it affects only state and local governments. That is wrong twice over. First, states are of course entitled to sovereign immunity, and provisions waiving state sovereign immunity "must be strictly construed * * * in favor of the sovereign." *Sossamon* v. *Texas*, 563 U.S. 277, 292 (2011) (internal quotation marks omitted). Second, the statutory provision governing Title VII claims for federal employees expressly makes "section 2000e-5(f)" applicable to claims against the Federal Government, and dictates that claimants "may file a civil action as provided in section 2000e-5." 42 U.S.C. § 2000e-16(c), (d).

"every incentive" to raise exhaustion as an affirmative defense. Resp. Br. 28-29. But this Court does not assume that Congress relies on litigants to vindicate "system-related goal[s]." *John R. Sand*, 552 U.S. at 133. Jurisdictional limits are usually in a defendant's interests to invoke, but defendants sometimes fail to invoke them nonetheless—whether through inadvertence, disinterest, or strategic calculation. Courts therefore are responsible for policing compliance with such rules "despite a waiver." *Id.* at 134.

Respondent doubts that Title VII defendants would ever intentionally forgo raising an exhaustion defense. But defendants often prefer to obtain dismissal of a weak case on the merits, rather than for failure to exhaust: Among other reasons, a merits dismissal has *res judicata* effect, avoids giving the plaintiff an opportunity to alert the EEOC to the claim, and often prevents a plaintiff from pursuing related state-law claims in state court. Defendants are only more likely to try such a tactic in "[t]he New World" respondent advocates, "in which it is *certain* that" failure to exhaust "will not have jurisdictional consequences." *Gonzalez*, 565 U.S. at 158 n.1 (Scalia, J., dissenting).

In contrast, there is little merit to respondent's speculation that, if the exhaustion requirement is deemed jurisdictional, defendants will engage in "vexatious behavior" by waiting to raise exhaustion issues until losing on the merits. Resp. Br. 34. That concern is somewhat at odds with respondent's assertion that defendants have "every incentive" to raise exhaustion at the outset. *Id.* at 29. Furthermore, it assumes an implausible degree of inatten-

tion on behalf of courts and parties: If exhaustion is deemed a jurisdictional requirement, courts will consider it at the outset of a case, just as they consider other jurisdictional requirements like standing and diversity jurisdiction. Indeed, in *every* case cited in the petition for certiorari from circuits that deem exhaustion jurisdictional, exhaustion was raised at the earliest possible stage of the litigation; none involved the gamesmanship respondent fears. *See* Pet. 10-14.[2] Even here, petitioner did not raise exhaustion until remand only because that is when respondent amended her complaint to clarify, for the first time, that she was raising a standalone claim based on her firing, rather than presenting it as part of a course of retaliatory conduct. *Compare* J.A. 22-24, *with* J.A. 44-49.

Respondent also worries that petitioner's rule will require courts to resolve "complex or difficult exhaustion questions" instead of skipping to an easier merits ground for dismissal. Resp. Br. 33-34. But that is a *virtue* of petitioner's approach. Requiring courts to enforce the exhaustion requirement rather than dismissing a claim on the merits will ensure that plaintiffs have an opportunity to pursue their claims at the EEOC, potentially turning up helpful evidence and converting an easy merits dismissal into a plaintiff victory. Furthermore, the earlier the exhaustion issue is addressed, the more likely plaintiffs will be able to return to the EEOC within the statutory time limit for filing a charge.

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[2] These cases also suggest that plaintiffs regularly attempt to plead unexhausted claims, contrary to respondent's assertion. Resp. Br. 28-29.

In any event, respondent greatly exaggerates the difficulty of the exhaustion question. The statute sets out precisely what a plaintiff must do to exhaust: inform the EEOC of the "date, place and circumstances of the alleged unlawful employment practice" and wait until the EEOC resolves the claim or fails to act. 42 U.S.C. § 2000e-5(b), (f)(1). And in the rare borderline case involving difficult exhaustion questions that a defendant fails to brief, courts need not analyze the issue on its own. Resp. Br. 31, 33. They can order briefing on the question.

The straightforward exhaustion analysis makes plain that respondent did not exhaust her religious discrimination claim. Respondent acknowledges that she did not attempt to inform the EEOC of her religious-discrimination claim until "late summer or fall 2011." J.A. 71. Even if that attempt were considered successful, *but see* Pet. Br. 54-56, respondent sought her right-to-sue notice in November 2011, J.A. 98, and filed suit in January 2012, J.A. 16, before the 180-day period of exclusive agency jurisdiction expired. *See* 42 U.S.C. § 2000e-5(f)(1). Under the plain terms of Title VII, respondent failed to exhaust her claim, and the District Court lacked jurisdiction to consider it.

CONCLUSION

For the foregoing reasons, the Fifth Circuit's judgment should be reversed.

Respectfully submitted,

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APRIL 2019